

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 203

ELI LILLY AND COMPANY, APPELLANT,

vs.

SAV-ON-DRUGS, INC.

and

STATE OF NEW JERSEY

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF NEW JERSEY

FILED JUNE 30, 1960

JURISDICTION NOTED OCTOBER 17, 1960

SUPREME COURT OF THE UNITED STATES

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[fol. A]

**IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION**

Docket No. A-70-59.

Civil Action

ELI LILLY AND COMPANY, a corporation of the
State of Indiana, Plaintiff-Appellant,

vs.

SAVON-DRUGS, INC., a corporation of the State of
New Jersey, Defendant-Respondent.

On Appeal from Superior Court, Chancery Division,
Union County.

Sat-below: Scherer, J. S. C.

Appendix to Brief for Appellant

[fol. 1]

**SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, UNION COUNTY**

Docket No. C-2465-58

ELI LILLY AND COMPANY, a corporation of the
State of Indiana, Plaintiff,

vs.

SAV-ON-DRUGS, INC., a corporation of the State of
New Jersey, Defendant.

COMPLAINT—Filed July 3, 1959

Eli Lilly and Company a corporation of the State of Indiana, having its principal office in the City of Indianapolis, State of Indiana, complaining of the defendant, says:

1. For many years last past and at all times herein mentioned, plaintiff was and is now engaged in the production, sale and distribution of certain pharmaceutical preparations, commodities and products. Said products are listed in a certain book which will be presented to the Court at the time of hearing. Included in the products aforementioned are Gelseals 'Multicebrin' (Pan-Vitamins, Lilly), and Protamine, Zinc & Iletin (Insulin, Lilly) U-40. These products and all products set forth in the aforementioned book bear the trademarks or brand or name of plaintiff, Eli Lilly [fol. 2] and Company, the producer and owner thereof, and are sold in the State of New Jersey in fair and open competition with products of the same general class produced by others. Plaintiff is the sole owner of the right to use the trademarks, brands, names, labels and copy rights identifying said products. Each and all of said products have had and have a good reputation among wholesale and retail druggists, and with the public generally. Said products and the trademarks, brands, and names identifying them have been widely promoted both in the State of New Jersey and nationally and as a consequence of said promotions and as a consequence of the intrinsic merit of said products an extremely valuable good will attaches to them.

2. Said products have been and are now accordingly sold and distributed throughout the State of New Jersey and plaintiff enjoys a profitable business therefrom.

3. On or about the 3rd of January, 1938, plaintiff, in order to protect itself as the owner of its trademarks, brands and names identifying the said products so produced by it, and to protect its trade therein in the State of New Jersey, and to protect the public from the injuries of uneconomic practices in distribution recognized by the Fair Trade Act of the State of New Jersey (R. S. 56:4-3, et seq.), and to avail itself of the protection of the terms thereof, adopted a system of doing business with respect to said products whereby plaintiff established prices for the resale of its products within the State of New Jersey and announced to the trade that its products could not be resold at retail in said State of New Jersey at prices lower than the prices so specified and established. Plaintiff, to make the system effective, requested contracts from retailers under the terms of which retailers agreed not to resell plaintiff's products at prices lower than the prices which were established as aforesaid by plaintiff. Over 1,500 of said [fol. 3] contracts all identical in form and content relating to the resale of the commodities aforementioned produced and sold by plaintiff have been signed by retailers in the State of New Jersey. The defendants hereinafter named have had notice of the execution of the contracts aforementioned and of the minimum resale prices established pursuant to said contracts. A true copy of the contract aforementioned is annexed hereto and made a part hereof and marked "Exhibit A."

4. Retailers in the State of New Jersey have had since on or about January 17, 1938, full and complete knowledge of the system under which plaintiff has been operating its business and proposes to operate it and when any retailers, including defendant, acquired any of the products of plaintiff they did so with full knowledge of the facts aforesaid. After the announcement by plaintiff with respect to its system as heretofore set forth, retailers generally began to observe and conform with the terms of the said contracts and the said established prices of plaintiff, and price-

cutting on the articles produced and distributed by plaintiff, generally speaking, ceased, to the great benefit of the public generally and of the plaintiff, but as a result of the acts of the defendant hereinafter mentioned retailers represent that they will be unable to continue to observe and perform the terms of said contracts and to comply with the established price schedules of plaintiff because of the unfair competition to which they are subjected by defendant. Unless the acts of the defendant are prevented retailers will refuse to continue to comply with the terms of their contracts to the great injury and damage of plaintiff.

5. Plaintiff has been diligent and conscientious in the enforcement of its minimum resale price maintenance program hereinabove described. In addition to voluminous mailings of correspondence to retailers, telephone conversations [fol. 4] tions, shoppings and personal visits, plaintiff has frequently invoked the processes of the courts against retailers guilty of selling plaintiff's products at prices less than those established by plaintiff as aforesaid. Prior to September, 1948, in the Court of Chancery of New Jersey, and subsequently in the Chancery Division of the Superior Court, plaintiff instituted legal proceedings and secured injunctive relief against offending retailers in the following cases, showing the docket number and date of entry of the injunction:

- | | |
|---|---|
| 1. Ace Cut Rate Drugs, Inc.
123 682 1939
#31843
February 23, 1939 | 2. Central Drug Co.
124 569 1939
#40256
October 23, 1939 |
| 3. Clinton Cut Rate
129 418 1940
#49896
August 13, 1940 | 4. Weissbard Bros
139 5 1941
#66000
February 3, 1942 |
| 5. Fay's Cut Rate Pharmacy
139 137 1941
#66001
June 10, 1941 | 6. Wolf Drug Co.
139 147 1941
#66002
June 12, 1941 |
| 7. Schuster's Drug Stores, Inc.
148 639 1945
#254
October 30, 1945 | 8. Dell's Cut Rate
Lizzach's Pharmacy, Inc.
148 693 1945
#981
December 10, 1945 |

9. Heller's Pharmacy
148 692 1945
#1071
December 10, 1945
10. Master's Drug Co., Inc.
158 309 1947
#R 4599
11. Court Drug Co.
158 143 1947
June 19, 1947
12. Rubin Bros. Pharmacy, Inc.
158 149 1947
#R 3810
June 19, 1947
13. Ace Drug Store
158 317 1947
#R 4647
October 27, 1947
14. Rutherford Drug Store, Inc.
158 569 1948
April 21, 1958
- [fol. 5]
15. Central Drug Co. of
E. Rutherford
158 570 1948
#R 11264
April 21, 1948
16. Woods Drug Co.
158 587 1948
#R 10333
April 29, 1948
17. Jarvis Drug Store
158 601 1949
#R 10726
April 29, 1948
18. J. & J. Drug Co.
C 1473 1948
May 5, 1949
19. Mack Drug Co.
C 290 1949
December 16, 1949
20. Charline's Cut Rate
C 1687 1949
May 12, 1950
21. Drug Fair
C 1076 1950
February 9, 1951
22. Sussman's Drugs
C 1195 1950
February 23, 1951
23. Sharr Drug Co.
C 1145 1953
February 17, 1954
24. Carolina Pharmacy
C 1143 1953
February 18, 1954
25. Bell's Drug Store
C 2166 1953
July 7, 1954
26. James P. Smith, Inc.
C 378 1955
December 5, 1955
27. F. & M. Drug Co.
C 2231 1955
July 10, 1956
28. Chase Drugs
C 612 1956
December 6, 1956
29. Highway Drug Co.
C 1470 1956
April 26, 1957
30. Modell's Shoppers World of
Bergen County, Inc.
C 2151 1956
June 20, 1957

- | | |
|--|---|
| <p>31. Seymour Greenspan and
Joseph J. Hahn t/a
Wald Drugs
C 2118 1958
June 17, 1959</p> | <p>32. Bell's Drug Store of
Fanwood, Inc.
C 2119 1958
June 29, 1959</p> |
| <p>33. Bay Drug Co., Inc.
C 2120 1958
June 19, 1959</p> | |

In addition thereto in cases number 1, 2, 8 and 20, above, orders adjudging defendant in contempt of court for violation of the injunctions aforesaid were obtained on application of plaintiff.

[fol. 6] 6. By means of the aforementioned litigation, by means of shopping various stores throughout the State of New Jersey, including those in the vicinity of defendant, by means of correspondence, telephone calls and personal visits, plaintiff has generally secured compliance with its fair trade program, with the exception of the defendant hereinafter named.

7. Defendant, Sav-On Drugs, Inc., a corporation of the State of New Jersey, is the owner and operator of a diversified retail store located at 215 East Front Street, in the City of Plainfield, County of Union and State of New Jersey; and among the products offered for sale and sold by defendant are pharmaceutical products and preparations, drugs and medicinal products, and included among these are the products of plaintiff, and particularly Protamine, Zinc & Iletin (Insulin, Lilly) U-40 and Gelseals 'Multi-cebrin' (Pan Vitamins, Lilly) and these are sold under the trade-marks, brands, names, labels and copyrights owned by plaintiff.

8. Defendant has had knowledge and notice of the contracts executed by plaintiff with retail dealers in the State of New Jersey under the provisions of the New Jersey Fair Trade Act (R. S. 56:4-3 et seq.), and of the minimum resale prices for the products aforementioned manufactured, distributed and sold by plaintiff as established and specified pursuant to the aforementioned contracts.

9. There has been for some time past, and continuing to the date hereof, practiced in the State of New Jersey by certain retail merchants a system of merchandising known as the "cooperative cash discount system." Pursuant thereto retailers purchase from a certain corporation known as The Sperry & Hutchinson Company quantities of cash discount tokens known as "S. & H. Green Cooperative Cash Discount Stamps" and thereafter present the same to retail customers [fol. 7] as part of and together with the purchase and sale of merchandise. Plaintiff is informed and believes that said retail customers are given one "S. & H. Green Cooperative Cash Discount Stamp" for each \$0.10 of cash given in payment. After receipt by the customer the said "S. & H. Green Cooperative Cash Discount Stamps" are pasted in books known as "S. & H. Green Stamp Collectors' Books" provided the customer for said purpose by participating retailers and therein accumulated. Upon accumulation of a stated number of said "S. & H. Green Cooperative Cash Discount Stamps" pasted in the stamp books aforesaid, redemption is made therefor by the said Sperry & Hutchinson Company in the form of merchandise referred to in advertisements by the Sperry & Hutchinson Company as "Distinguished Merchandise," selected by the customer in stores designated by the said Sperry & Hutchinson Company and known as "S. & H. Green Stamp Redemption Stores" which are situated in various locations within the State of New Jersey. Each said "S. & H. Green Stamp Collectors' Book" has provision for the insertion of 1,200 green stamps and when completely filled, plaintiff is informed and believes, has a redemption value of approximately \$2.50 in terms of the retail value of the merchandise for which redeemed and represents a cash discount to the purchaser on purchases for which green stamps are given by the retailer of approximately 2.08%. Among the various items of "Distinguished Merchandise" for which "S. & H. Green Cooperative Cash Discount Stamps" (pasted in "S. & H. Green Stamp Collectors' Books") may be redeemed in "S. & H. Green Stamp Redemption Stores" are included sporting goods (such as fishing tackle, rifles, athletic equipment), lawn and garden equipment and furniture, cameras

and other photographic equipment, watches, clocks, furniture such as lamps, tables, chairs, hassocks, desks, all of various styles and models, picnic supplies, appliances of [fol. 8] different kinds such as toasters, coffee pots and food mixers, glassware, cooking utensils, rugs, linen, radios, blankets, bedspreads, bath equipment, books, toys, infants' needs, and more, which need not be set out in complete detail. Said merchandise is listed and illustrated in a publication distributed by The Sperry & Hutchinson Company through participating retailers, known as the "S. & H. Distinguished Merchandise Idea Book," which said publication is from time to time revised in accordance with changes in merchandise made available for redemption by the said Sperry & Hutchinson Company. A specimen "S. & H. Distinguished Merchandise Idea Book" is annexed hereto and made a part hereof by reference and marked "Exhibit B." A specimen "S. & H. Green Stamp Collectors' Book" is also annexed hereto and made a part hereof by reference and marked "Exhibit C."

10. As part of and in furtherance of the objects of the "cooperative cash discount system" The Sperry & Hutchinson Company maintains a continuous program of advertising and public relations. Said program has as its primary purpose that of circulating as widely as possible among the buying public generally the concept of "dollar savings" associated with the purchase of merchandise from retailers participating in the "cooperative cash discount system" i. e., those who give "S. & H. Green Cooperative Cash Discount Stamps" with merchandise purchased. The emphasis of said advertising is upon the cash savings realized by the customers who receive said stamps with their purchase. See, for example, at 46 *Life Magazine*, No. 21, p. 76 (May 25, 1959), a full page advertisement announcing: "Over 27,000,000 Smart, Thrifty Women Agree: S. & H. Green Stamp Savers Come Out Dollars Ahead." A copy of said advertisement is annexed hereto as "Exhibit D" and made a part hereof by reference.

[fol. 9] 11. The "S. & H. Distinguished Merchandise Idea Book" is also employed for advertising purposes. The back cover of catalog #64 (annexed hereto as Exhibit B) pro-

claims: "Smart, Thrifty shoppers know that stores giving S. & H. Green Stamps feature low, low prices. They're just naturally dollars ahead right at the start. And, they're dollars ahead *again* thanks to the valuable gifts received through S. & H. So shop at the fine stores and service stations that give you S. & H. Green Stamps. You get *savings on top of savings*—you're dollars ahead."

12. Even the "S. & H. Green Stamp Collector's Book" is used for the purpose of transmitting the slogans and theories of the "cooperative cash discount system." Typical of these are:

"S. & H. Green Stamps enable the merchant to give you a discount on small as well as large cash purchases. It's an easy and profitable practice for you." p. 3.

"S. & H. Green Stamps permit your merchant to say Thank You in a tangible way." p. 17.

"Your Green Stamp book helps your bankbook grow. Do your shopping at the stores that give S. & H. Green Stamps and add to your savings." p. 27.

"Buy from the progressive merchant who gives you S. & H. Green Stamps. Save your stamps until you have a full book and get that extra something you always wanted." p. 29.

13. To secure to the individual retailer the benefits of the advertising program conducted by The Sperry & Hutchinson Company there is often placed conspicuously on the retailers' premises a distinctive sign or emblem identifying the retailer as one who gives "S. & H. Green Cooperative Cash Discount Stamps", thereby notifying the public of cash discounts given by the said retailer with sale of merchandise.

[fol. 10] 14. Prior to November 5, 1958, plaintiff received reports advising that defendant was offering for sale and selling plaintiff's products at less than plaintiff's established minimum resale prices. Accordingly, plaintiff wrote to defendant advising defendant of the reports so received and advising defendant further of plaintiff's contracts with retailers throughout the State of New Jersey pursuant to

the New Jersey Fair Trade Act and requesting compliance with plaintiff's established minimum resale price schedules. A copy of said letter is annexed hereto and made a part hereof by reference and marked "Exhibit E". Said letter was sent Certified Mail, Return Receipt Requested. As a result of additional reports of price cutting by defendant, plaintiff again wrote defendant on March 30, 1959, demanding compliance and a copy of said letter is also annexed hereto and made a part hereof and marked "Exhibit F".

15. On April 3, 1959, defendants offered for sale and sold plaintiff's Protamine, Zinc & Iletin (Insulin, Lilly) U-40, 10cc. for \$1.48, the fair trade price of which was then and is now \$1.48, and gave to the purchaser with the product aforementioned 14 "S. & H. Green Cooperative Cash Discount Stamps." Said sale constituted a sale at less than plaintiff's established minimum resale prices by reason of the fact that the stamps aforementioned were redeemable for valuable merchandise when presented together with a stated number of others of the same kind to The Sperry & Hutchinson Company in the manner and at the places hereinabove described. Said sale is more particularly shown by the affidavits of Mildred Bilancetti and Michael Bilancetti annexed hereto.

16. On May 1, 1959, plaintiff, through its counsel, wrote to defendant advising defendant of said sale at less than the established minimum resale price and requesting defendant's written assurance that the practice of giving trading stamps with purchases of plaintiff's products would be discontinued. A copy of said letter is annexed hereto and made a part hereof by reference and marked "Exhibit G". The requested assurance was not given by defendant.

17. On May 7, 1959, defendant offered for sale and sold plaintiff's Gelseals 'Multicebrin' (Pan-Vitamins, Lilly) 100's for \$4.59, the fair trade price of which was then and still is \$5.08. With said merchandise defendant delivered to the purchaser 45 "S. & H. Green Cooperative Cash Discount Stamps". Said sale is more particularly shown by the affidavits of Frances Heyman and Norman Ellenport annexed hereto.

18. On May 20, 1959, defendant offered for sale and sold plaintiff's Protamine, Zinc & Iletin (Insulin, Lilly) U-40, 10cc., for \$1.48 the fair trade price of which was then and still is \$1.48, and delivered to the purchaser with the products aforementioned 14 "S. & H. Green Cooperative Cash Discount Stamps." Said sale is more particularly shown by the affidavits of Frances Heyman and Norman Ellenport annexed hereto.

19. On May 20, defendant offered for sale and sold plaintiff's Gelseals 'Multicebrin' (Pan-Vitamin, Lilly) 100's for \$4.59, the fair trade price of which was then and still is \$5.08 and delivered to the purchaser with the product aforementioned 45 "S. & H. Green Cooperative Cash Discount Stamps." Said sale at less than the established minimum resale price is more particularly shown by the affidavits of Eleanor Hanlon and Rita Waslin annexed hereto.

20. By reason of the foregoing acts of unfair competition, plaintiff has been and will in the future be seriously injured and damaged and its valuable good will identified with the aforementioned trademarks, names, brands, labels [fol. 12] and copyrights, will be seriously impaired in the following respects:

(a) Dissatisfaction has been and will be created among retail dealers in the articles manufactured, distributed and sold by the plaintiff, and retailers will violate their contracts aforesaid with plaintiff in order to meet the aforementioned unfair competition;

(b) Price wars will be precipitated which will be disastrous and irreparably injurious to the plaintiff and to the retail dealers with whom plaintiff contracts in the distribution of its aforesaid products, with the result that the minimum prices of plaintiff will be violated generally, and the valuable good will of plaintiff will be destroyed;

(c) The incentive of retail dealers to handle the stock and sell the products of plaintiff will be destroyed;

(d) The consumers and the public generally will be led to believe that the prices charged by other retailers for the products of plaintiff under the contracts aforementioned

pursuant to the New Jersey Fair Trade Act, are unreasonable and exorbitant, which is not the fact, and will discontinue purchasing the said products.

Wherefore, plaintiff demands:

(a) That defendant, its officers, agents, servants and employees, be enjoined and restrained from selling, advertising for sale and offering for sale at its store or otherwise, products of Eli Lilly and Company at less than the prices specified and established by plaintiff from time to time, pursuant to the provisions of the New Jersey Fair Trade Act, R. S. 56:4-3, et seq.

(b) That defendant, its officers, agents, servants, and employees be enjoined and restrained from giving to purchasers of plaintiff's products "S. & H. Green Cooperative [fol. 13] Cash Discount Stamps" or any other token which may be redeemed for cash or merchandise where the number of such stamps or tokens given is computed entirely or in part with relation to the price paid by the customer for the purchase of plaintiff's product or products, and where the giving of such stamps or other tokens results in a sale of plaintiff's products at less than the established minimum resale prices of plaintiff.

(c) That defendant, its officers, agents, servants and employees, be temporarily enjoined and restrained as aforesaid.

(d) Damages in the sum of Twenty-Five Thousand Dollars (\$25,000.00).

(e) Costs.

(f) That plaintiff have such other and further relief as may be proper.

Lorentz and Stamler, Attorneys for Plaintiff, By
Joseph H. Stamler, A Member of the Firm.

ELI LILLY AND COMPANY.

Manufacturer-Retailer Contract

THIS AGREEMENT executed in duplicate by and between ELI LILLY AND COMPANY, an Indiana corporation of Indianapolis, Indiana, (hereinafter called Manufacturer) and

doing business at

STREET ADDRESS

POST OFFICE

STATE

(hereinafter called Retailer); WITNESSETH:

WHEREAS Manufacturer is engaged in the manufacture and sale of a complete line of pharmaceutical and biological commodities which are identified by its trade-marks, brands, and name, and which are in free, fair, and open competition with commodities of the same general class manufactured and distributed by others, and Retailer is engaged in the sale and distribution at retail of Manufacturer's "Identified Commodities" and of competitive commodities produced by others, and the parties hereto desire to avail themselves of the benefits of the Fair Trade Act enacted by the state in which Retailer does business, as shown above:

NOW, THEREFORE, the parties do hereby stipulate and agree as follows:

1. Manufacturer's "Identified Commodities" shall mean and include all products listed in Manufacturer's current catalog or in any revision thereof which bear on the labels or containers of which bear the trade-marks, brands, or name of Manufacturer and which are in free, fair, and open competition with commodities of the same general class produced or distributed by others.
2. Retailer hereby agrees not to sell, offer to sell, or advertise any of Manufacturer's "Identified Commodities" at less than the minimum retail resale prices therefor established by Manufacturer under Paragraph 3 hereof; provided, however, that such minimum retail resale prices shall not apply to sales made by Retailer to physicians, dentists, veterinarians, hospitals, or state, county, or municipal institutions.
3. The minimum retail resale prices for Manufacturer's "Identified Commodities" shall be ten (10%) percent less than the List Prices respectively designated therefor in Manufacturer's current catalog or in any revision thereof, it being agreed that said catalog, together with any such revisions, shall be deemed to be incorporated herein as a part of this contract.
4. Manufacturer reserves the right to effect such changes in the "Identified Commodities" listed in its said catalog and in the minimum retail resale prices established therefor as it, in its sole discretion, may determine, and it is agreed that all such changes shall become effective and binding upon Retailer upon receipt of written or printed price revision sheets.
5. The following acts or practices shall be deemed to constitute a violation of Paragraph 2 hereof:
 - a. The giving by Retailer of anything of value, whether tangible or intangible, in connection with the sale of any of Manufacturer's "Identified Commodities."
 - b. The granting of any kind of a concession whatsoever in connection with the sale of Manufacturer's "Identified Commodities."
 - c. The sale of any merchandise in combination with the sale of Manufacturer's "Identified Commodities."
6. Retailer agrees not to knowingly sell any of Manufacturer's "Identified Commodities" to any dealer who fails to observe the minimum retail resale prices established under Paragraph 3 hereof.
7. It is agreed that the minimum retail resale prices established under Paragraph 3 hereof shall not apply to any transaction specifically exempted from the operation of this Contract under the provisions of the Fair Trade Act of the state in which Retailer does business.
8. In consideration of the execution hereof by Retailer, it is agreed that to the extent permitted by law, Manufacturer will use every reasonable means to prevent the sale of its "Identified Commodities" by any dealer in competition with Retailer at prices less than the minimum retail resale prices established under Paragraph 3 hereof. In the performance of its obligations under this paragraph Manufacturer shall not be required to institute legal proceedings unless such action in Manufacturer's judgment is necessary and feasible, and in determining this question Manufacturer may take into account, among other things, the expense involved and the pendency of similar actions.
9. This Contract shall be interpreted under and shall be subject to the limitations imposed by the Fair Trade Act of the state in which Retailer does business, and in the event any provision of this Contract shall be held invalid under such Act or under any other statute, law, or public policy, or in the event this Contract shall be held inapplicable with respect to any given set of facts or circumstances, then, or in either of such events, the remaining provisions of this Contract and its applicability to all other sets of facts or circumstances shall be unaffected thereby.
10. This Contract shall apply only to the resale of Manufacturer's "Identified Commodities" by Retailer within the state in which Retailer does business.
11. This Contract shall remain and continue in full force and effect until and unless the same is terminated as hereinafter provided. Either party hereto may cancel or terminate this Contract by giving not less than thirty (30) days' notice in writing to the other party of his intention so to do. Any notice under this Contract given by either party to the other shall be sufficient if it is deposited in the United States Mail in a duly stamped envelope and addressed to the party hereto at the address designated in the opening Paragraph of this Contract. The termination of this Contract by Retailer, under the terms of this Paragraph, shall not relieve it of any obligation imposed under the Fair Trade Act of the state in which Retailer does business, nor shall either of the parties hereto, by virtue of such termination, be deprived of any rights granted under such Act.

Executed this

day of

19

ELI LILLY AND COMPANY

By

MANUFACTURER

[fol. 16]

EXHIBIT "E" TO COMPLAINT

November 5, 1958.

Sav-On Drug
115 E. Front Street
Plainfield, New Jersey

Gentlemen:

We have been informed that you are selling Eli Lilly and Company products at prices below the minimum retail resale prices established for them in accordance with the provisions of the New Jersey Fair Trade Act. Specifically, it has been reported that you are selling NPH Iletin (insulin, Lilly) U.S.P., M-340, U-40 at \$1.30, whereas the fair trade price for this product is \$1.48.

We are enclosing for your information duplicate copies of our regular form of Manufacturer-Retailer Fair Trade Contract which has been signed by a substantial number of retail druggists in the State of New Jersey and in your community and which is now in full force and effect. Under the provisions of these contracts, we have established minimum retail resale prices for our trademarked commodities at ten percent less than the list prices shown in our current Price List. You have been furnished with a copy of the Lilly Price List, and you are furnished with changes in this Price List at regular intervals.

Under the provisions of the New Jersey Fair Trade Act, you are required to adhere to the minimum retail resale prices which we have established for our products, as explained above, even though you may not have signed one of our Manufacturer-Retailer Fair Trade Contracts.

We trust that your future operations will be strictly in accordance with the obligations imposed upon you under the

[fol. 17] New Jersey Fair Trade Act, so that there will be no occasion for any further controversy or litigation.

Very truly yours,

ELI LILLY AND COMPANY
H. B. Blackwell
Legal Department

HBB:jj
Enclosure

Certified Mail—Return Receipt Requested

EXHIBIT "F" TO COMPLAINT

March 30, 1959.

Sav-On Drug
115 E. Front Street
Plainfield, New Jersey

Gentlemen:

We have again been informed that you are selling our products at prices below the minimum retail resale prices established for them in accordance with the provisions of the New Jersey Fair Trade Act. Specifically, it has been reported that you are selling Lilly LLETIX products below the fair trade prices.

You will recall that we wrote to you on November 5, 1958, concerning the sale of our products below the minimum retail resale prices; and we enclosed for your information duplicate copies of our Manufacturer-Retailer Fair Trade Contract. Under the terms of this contract, we have established minimum retail resale prices for products bearing our trademarks, brands, or name at ten percent less than the list prices shown in our current Price List. Under the provisions of the New Jersey Fair Trade Act, you are obligated to uphold our minimum retail resale prices whether you have signed one of our contracts or not.

It is our policy to employ all reasonable means to require the uniform observance of the minimum retail resale prices which we have established, and in our general enforcement policy we are prepared to file suits for injunctions where contract violations cannot be adjusted on a voluntary basis.

We trust that your future operations will be in accordance with your obligations under the contract and under the New Jersey Fair Trade Act, so that there will be no occasion for further controversy or litigation.

Very truly yours,

ELI LILLY AND COMPANY
H. B. Blackwell
Legal Department

HBB:jj
Enclosure

Certified Mail—Return Receipt Requested

[fol. 19] *Duty sworn to by Louis V. Clemente, jurat omitted in printing.*

[fol. 20]

IN THE SUPERIOR COURT OF NEW JERSEY

UNION COUNTY

NOTICE OF MOTION FOR INTERLOCUTORY INJUNCTION—
Filed August 5, 1959

To: Sav-On Drugs, Inc., defendant,
c/o Harold Druse, Registered Agent,
7-9 Watchung Avenue,
Plainfield, New Jersey.

Sirs:

Please take notice that on Tuesday, August 11, 1959, at 10 o'clock in the forenoon or as soon thereafter as counsel may be heard, the undersigned attorneys shall apply to a judge of the Superior Court, Essex County, Chancery Divi-

sion, at the Hall of Records, Newark, New Jersey, for an Interlocutory Injunction restraining and enjoining you, your officers, agents, servants, employees and attorneys in fact, from selling, advertising for sale and offering for sale at your store or otherwise, products of plaintiff, Eli Lilly and Company, at less than prices from time to time fixed and established by plaintiff Eli Lilly and Company, pursuant to the New Jersey Fair Trade Act, N. J. S. 56:4-3 etc.

Please take further notice that at the time and place aforesaid the undersigned attorneys shall also apply for an Interlocutory injunction restraining and enjoining you, your agents, servants, officers, employees and attorneys in fact, from issuing to purchasers of products of plaintiff Eli Lilly & Company "S. & H. Green Cooperative Cash Discount Stamps" or any other token which may be redeemed for cash or merchandise where the number of such stamps or tokens given is computed entirely or in part with relation to the price paid by the customer for the purchase of plaintiff's product or products, and where the giving of such stamps or other tokens results in a sale of plaintiff's products at less than prices specified and established by plaintiff.

Lorentz & Stamler, Attorneys for Plaintiff, By
Melvin P. Antell, A Member of the Firm.

Dated: July , 1959.

[fol. 21]

IN THE SUPERIOR COURT OF NEW JERSEY
UNION COUNTY

AFFIDAVIT OF RICHARD L. BONELLO—Filed August 10, 1959
State of New Jersey,
County of Essex, ss.:

Richard L. Bonello, being duly sworn, according to law, upon his oath deposes and says:

1. I am employed by Lum, Fairlie and Foster, attorneys for defendant in the above action.

2. On Thursday, August 6, 1959, and Friday, August 7, 1959, at the direction of Warren E. Dunn, an associate in the firm of Lum, Fairlie and Foster, I went to the office of the Clerk of the Superior Court, Trenton, New Jersey to examine the pleadings and papers on file in the cases listed in paragraph 5 of the complaint in the above action.

3. I personally examined the pleadings and papers on file at the said clerk's office in all of said cases. Some of the said pleadings and papers were on microfilm, and as to those, my examination was accomplished by the use of a microfilm projector.

4. The said pleadings and papers contain no reference to the issuance of trading stamps in connection with the sale of plaintiff's fair trade products, nor in any other connection. There is no statement in said pleadings that the issuance of trading stamps with the sale of fair trade merchandise is in violation of the New Jersey Fair Trade Act, nor has the issuance of trading stamps with the sale of fair trade merchandise been enjoined by the Court in the actions listed in paragraph 5 of the complaint.

Richard L. Bonello

Sworn to and subscribed before me,
this 10th day of August, 1959.

Jean Robertson,
Notary Public of New Jersey.
My Commission Expires June 17, 1962.

(Seal)

[fol. 22]

IN THE SUPERIOR COURT OF NEW JERSEY

UNION COUNTY

AFFIDAVIT OF WARREN E. DUNN—Filed August 10, 1959

State of New Jersey,
County of Essex, ss.:

Warren E. Dunn, being duly sworn, according to law, upon his oath deposes and says:

1. I am an attorney at law of New Jersey and an associate in the firm of Lum, Fairlie and Foster, attorneys for the defendant in the above action.

2. On Thursday, August 6, 1959, I telephoned the office of the Secretary of State of New Jersey and spoke with a Mr. Foster, an employee in the Corporate Records division of that office.

3. I requested that Mr. Foster check the records of the Secretary of State of New Jersey with reference to Eli Lilly and Company, the plaintiff in the above action.

4. I was informed by Mr. Foster that Eli Lilly and Company is not registered with the Secretary of State of New Jersey as a domestic corporation nor as a foreign corporation authorized to transact business in the State of New Jersey.

5. During said telephone conversation I requested that a Certificate of No Record be issued by the Secretary of State of New Jersey and mailed to Lum, Fairlie and Foster, with the cost of same to be charged to the account of said firm.

6. The said Certificate of No Record has not been received by Lum, Fairlie and Foster as of the date of this affidavit.

7. This affidavit is submitted as proof that Eli Lilly and Company, plaintiff in the above action, a corporation of the [fol. 23] State of Indiana (as appears from the complaint), is not registered with the Secretary of State of New Jersey

as a foreign corporation authorized to transact business in the State of New Jersey.

8. This affidavit is further submitted in opposition to the plaintiff's motion for an interlocutory injunction, and in support of the defendant's contention that plaintiff has no right to maintain an action in the Courts of the State of New Jersey by reason of its being a foreign corporation transacting business in New Jersey without authorization from the Secretary of State of New Jersey.

Warren E. Dunn

Sworn to and subscribed before me,
this 10th day of August, 1959.

Jean Robertson,
Notary Public of New Jersey.
My Commission Expires June 17, 1962.

[fol. 24]

IN THE SUPERIOR COURT OF NEW JERSEY
UNION COUNTY

ORDER DENYING INTERLOCUTORY INJUNCTION—
August 12, 1959

This matter having been opened to the Court on August 11, 1959 by Lorentz & Stamler, attorneys for plaintiff (Joseph H. Stamler appearing), in the presence of Lum, Fairlie & Foster, attorneys for defendant, (William F. Tompkins and Warren E. Dunn appearing), Harold Druse of the New Jersey Bar and Casey, Lane & Mittendorf of the New York Bar (Robert W. Sweet appearing); of counsel to the defendant, upon plaintiff's notice of motion for an interlocutory injunction to restrain the defendant, its officers, agents, servants, employees and attorneys in fact, from selling, advertising for sale and offering for sale, products of the plaintiff at less than prices fixed by plaintiff pursuant to the New Jersey Fair Trade Act, R. S. 56:4-3 et seq., and further to restrain and enjoin the defendant, its agents, servants, officers, employees and attorneys in fact from issuing to purchasers of plaintiff's products,

S. & H. green co-operative cash discount stamps or of any token which may be redeemed for cash or merchandise where the number of such stamps or tokens given is computed entirely or in part with relation to the price paid by the customer for the purchase of plaintiff's products and where the giving of said stamps or other tokens results in the sale of plaintiff's products at less than prices fixed by plaintiff, and the Court having considered the verified complaint filed herein as well as the exhibits annexed thereto, the affidavits and briefs filed by the parties hereto, together with certain exhibits offered in evidence at the hearing, the argument of counsel thereon, and the Court having made the following findings of fact and conclusions of law for the purposes of this motion, to wit:

1. The plaintiff corporation is a corporation of the State of Indiana.

[fol. 25] 2. The plaintiff corporation is not authorized to transact business in New Jersey as a foreign corporation.

3. The plaintiff corporation is transacting business in the State of New Jersey within the meaning of R. S. 14:15-3 and 14:15-5.

4. Pursuant to the laws of the State of New Jersey and the laws of the State of Indiana and the reciprocal provisions thereof regarding foreign corporations transacting business within each of said states, the plaintiff corporation has no present standing to maintain any suit, proceeding, action at law or in equity, upon any claim, legal or equitable, whether arising out of contract or tort, in any Court in New Jersey;

Upon the foregoing findings of fact and upon hearing argument of counsel on August 12, 1959 as to the form of the Order, in the presence of Lum, Fairlie & Foster (Warren E. Dunn appearing) and Lorentz & Stamler (Melvin P. Antell appearing), for good cause shown,

It is on this 12th day of August, 1959

Ordered and adjudged that the plaintiff's motion for interlocutory injunction be and the same hereby is denied.

Everett M. Scherer, J. S. C.

[fol. 26]

IN THE SUPERIOR COURT OF NEW JERSEY
UNION COUNTY

NOTICE OF MOTION TO DISMISS COMPLAINT—Filed
August 17, 1959

To: Lorentz & Stamler, Esqs.,
Attorneys for Plaintiff,
11 Commerce Street,
Newark 2, New Jersey.

Sirs:

Please take notice that on Tuesday, August 18, 1959, at 10:00 o'clock in the forenoon or as soon thereafter as counsel may be heard, the undersigned, attorneys for defendant, Sav-On Drugs, Inc., will apply to the Superior Court of New Jersey, Chancery Division, Union County, at the Essex County Hall of Records, Newark, New Jersey, for an order dismissing the plaintiff's complaint upon the ground that plaintiff corporation, a foreign corporation not authorized to transact business in the State of New Jersey, is transacting such business and is therefore without standing to maintain the above action, and

Take further notice that in support of its application the defendant shall rely upon memorandum of law, affidavit of Samuel J. Sirota, affidavit of James P. Herring, copies of which shall be served upon you with this notice of motion, and defendant shall also rely upon the pleadings and other papers heretofore filed with the Court, and Exhibit D-1 marked in evidence on August 11, 1959.

Lum, Fairlie & Foster, Attorneys for Defendant,
Sav-On Drugs, Inc., By William F. Tompkins,
A Partner.

[fol. 27]

IN THE SUPERIOR COURT OF NEW JERSEY
UNION COUNTY

AFFIDAVIT OF SAMUEL J. SIROTA IN SUPPORT OF MOTION
—Filed August 17, 1959

State of New Jersey,
County of Essex, ss.:

Samuel J. Sirota, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am employed by Lum, Fairlie & Foster, attorneys for defendant in the above action.

2. On Wednesday, August 12, 1959, at approximately 11:55 A. M. at the direction of Warren E. Dunn, an associate in the firm of Lum, Fairlie & Foster, I went to the Military Park Building, 60 Park Place, Newark, New Jersey.

3. At said time and place I examined the office directory in the building lobby and saw the following listing: "Eli Lilly—617".

4. I immediately proceeded by elevator to the sixth floor of said building and observed that the door to room 617 bears the following legend: "Eli Lilly & Company".

Samuel J. Sirota

Sworn to and subscribed before me
this 12th day of August, 1959.

Jean Robertson,
Notary Public of New Jersey.
My Commission Expires June 17, 1962.

[fol. 28]

IN THE SUPERIOR COURT OF NEW JERSEY
UNION COUNTY

AFFIDAVIT OF JAMES P. HERRING IN SUPPORT OF MOTION
—Filed August 17, 1959

State of New Jersey,
County of Essex, ss.:

James P. Herring, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the president of the defendant corporation, Sav-On Drugs, Inc. and make this affidavit in support of the defendant's motion to dismiss plaintiff's complaint.

2. The defendant corporation was organized in the State of New Jersey in or about 1954 and since its inception I have been personally active in the business operations of the defendant, particularly with the running of both stores which it operates in New Jersey. In or about 1954, the defendant corporation opened a retail drug store in Plainfield, New Jersey, and in or about 1958 defendant corporation opened a retail drug store in Carteret, New Jersey.

3. At both of said stores since their opening, products of the plaintiff, Eli Lilly and Company, have been sold.

4. To my knowledge, the plaintiff, Eli Lilly and Company, operates and maintains an office in the State of New Jersey, at No. 60 Park Place, Newark, New Jersey, telephone number Market 3-2721. I have never personally gone to that office but I have directed correspondence to it and particularly to Mr. L. Audino, who, to my knowledge, is an employee of Eli Lilly and Company and is in charge of that office. On several occasions I have telephoned that office and talked with Mr. Audino. My reason for calling Mr. Audino on the occasions mentioned was to advise him that certain retail druggists were selling products of the plaintiff below the fair trade price fixed by the plaintiff.

5. The plaintiff, Eli Lilly and Company maintains a sales force in the State of New Jersey and salesmen of

that company have called upon the defendant corporation at both of the stores above mentioned.

[fol. 29] 6. Mr. L. Haney is the Eli Lilly and Company salesman in New Jersey, Middlesex County area. Mr. Haney calls regularly at the defendant corporation's Carteret, New Jersey, store. I have personally met Mr. Haney and have on occasion made complaints to him that other retail druggists in the Carteret, New Jersey, area were selling the fair traded products of the plaintiff corporation below the established price.

7. When Mr. Haney calls at the defendant's Carteret, New Jersey store, he personally checks the stocks and inventories of Eli Lilly and Company products maintained there. He accepts orders for purchase of Eli Lilly and Company products.

8. Mr. Haney has advised the defendant corporation in connection with the opening of its Carteret, New Jersey, store that Eli Lilly and Company makes available to retail druggists certain advertising and promotional material without cost to the retail druggist. Mr. Haney offered to provide printed announcements for mailing to the medical profession in Carteret, New Jersey, area concerning the opening of the defendant's store in Carteret, New Jersey. These announcements were received from Eli Lilly and Company by the defendant corporation without cost to it and mailed to doctors in the Carteret, New Jersey area. To my knowledge Mr. Haney resides at 748 Canton Street, Elizabeth, New Jersey and his telephone number is Elizabeth 2-5343. Mr. Haney has provided the defendant corporation with his home address and home telephone number and has requested that he be contacted at home in connection with any matters arising from the sale of the products of Eli Lilly and Company at defendant's Carteret, New Jersey store.

9. Mr. Henry W. Gondyke is the Eli Lilly and Company salesman in New Jersey, Union County area. Mr. Gondyke calls regularly at the defendant corporation's Plainfield, [fol. 30] New Jersey, store. I have personally met Mr. Gondyke and have on occasion made complaints to him

that other retail druggists in the Plainfield, New Jersey, area were selling the fair traded products of the plaintiff corporation below the established price.

10. When Mr. Gondyke calls at the defendant's Plainfield, New Jersey store, he personally checks the stocks and inventories of Eli Lilly and Company products maintained there. He accepts orders for purchase of Eli Lilly and Company products.

11. Mr. Gondyke advised the defendant corporation in connection with the opening of its Plainfield, New Jersey, store that Eli Lilly and Company makes available to retail druggists certain advertising and promotional material without cost to the retail druggist. Mr. Gondyke offered to provide printed announcements for mailing to the medical profession in Plainfield, New Jersey, area concerning the opening of the defendant's store in Plainfield, New Jersey. These announcements were received from Eli Lilly and Company by the defendant corporation without cost to it and mailed to doctors in the Plainfield, New Jersey area. To my knowledge Mr. Gondyke resides at 1207 W. 7th Street, Plainfield, New Jersey and his telephone number is Plainfield 6-2055. Mr. Gondyke has provided the defendant corporation with his home address and home telephone number and has requested that he be contacted at home in connection with any matters arising from the sale of the products of Eli Lilly and Company at defendant's Plainfield, New Jersey store.

James P. Herring

Sworn to and subscribed before me
this 13th day of August, 1959.

Jean Robertson,
Notary Public of New Jersey.
My Commission Expires June 17, 1962.

[fol. 31]

IN THE SUPERIOR COURT OF NEW JERSEY
UNION COUNTY

AFFIDAVIT OF R. O. CLUTTER IN OPPOSITION TO MOTION
—Filed August 17, 1959

County of Marion,
State of Indiana, ss.:

R. O. Clutter, being first duly sworn upon his oath, deposes and says:

That he resides at 7998 Oakland Road, Indianapolis, Indiana, and is the Assistant Secretary of Eli Lilly and Company.

That Eli Lilly and Company is an Indiana corporation engaged in the manufacture and sale of pharmaceutical products with its offices and principal place of business located in Indianapolis, Indiana.

That it sells pharmaceutical products to selected wholesale distributors located throughout the United States who in turn resell said products to the retail trade.

That it leases no sales offices, owns no real estate, maintains no warehouse or other place of business, and maintains no stock of goods in the State of New Jersey.

That its products sold to customers in the State of New Jersey are sold to wholesale distributors in interstate commerce pursuant to distributor contracts made in the State of Indiana.

That it does not sell to the retail trade; its activity in the State of New Jersey being limited to promotional and informational work performed by employees who do not accept orders for products. The primary purpose of said employees is to acquaint retail pharmacists, physicians, and hospitals with the products of Eli Lilly and Company so that the said retail pharmacists, physicians, and hospitals will order Lilly products from local wholesale distributors.

[fol. 32] That Eli Lilly and Company has executed Manufacturer-Retailer Fair Trade Contracts with a substantial number of retail pharmacists in the State of New Jersey, all of said contracts having been accepted at Indianapolis, Indiana.

That the sales of said pharmaceutical products sold to customers located in the State of New Jersey are approximately 2.7 percent of the total domestic sales of said Eli Lilly and Company, said sales made to New Jersey customers being made in interstate commerce.

R. O. Clutter

Subscribed and sworn to before
me this 14 day of August, 1959:

Sara K. Denhart,
Notary Public.

My commission expires 11/25/62.

[fol. 33]

IN THE SUPERIOR COURT OF NEW JERSEY
UNION COUNTY

AFFIDAVIT OF LEONARD L. AUDINO IN OPPOSITION TO MOTION
—Filed August 17, 1959—

State of New Jersey,
County of Essex, ss.:

Leonard L. Audino, of full age, being duly sworn upon his oath according to law, deposes and says:

1. I reside at 21 Yorktown Terrace, Livingston, New Jersey, and am employed by Eli Lilly and Company, plaintiff herein, in the Marketing Division thereof as District Manager for the district known as the Newark District.
2. I am the lessee of an office located in the Military Park Building, 60 Park Place, Newark, New Jersey, said office being that referred to in the affidavit of Samuel J. Sirota filed in the within Complaint by the defendant. The plaintiff herein is not a party to that lease, nor does it enjoy any rights or obligations thereunder.
3. I am reimbursed by Eli Lilly and Company for all expenses incidental to the maintenance and operation of, said office. There is also in said office one secretary in the employ of Eli Lilly and Company, who is paid by said company on a salary basis.

4. In my capacity as District Manager in the Marketing Division of plaintiff, there are employed under my supervision eighteen (18) detail men, referred to in the affidavit of James P. Herring, submitted by defendant herein, as "salesmen". Said detail men are paid on a salary basis by Eli Lilly and Company and receive no commissions. It is the function of said detail men only to visit retail pharmacists, physicians and hospitals and to acquaint same with the various products of Eli Lilly and Company, with a view to encouraging the purchase and use of said retail products by such institutions and professional men. The work of the [fol. 34] detail men is promotional and informational only. They do not accept orders under any circumstances for the purchase of Eli Lilly and Company products. Products of Eli Lilly and Company are sold to retailers in the State of New Jersey by wholesale distributors. On occasion, detail men of Eli Lilly and Company may, as a service to the retailer, receive an order for Eli Lilly and Company products only for the purpose of transmitting same to the wholesaler. Orders so received and transmitted are then subject to acceptance or rejection by the wholesaler. Under no circumstances may a detail man of Eli Lilly and Company enter into an agreement on behalf of the plaintiff for the sale of Eli Lilly and Company products to any customer.

5. In the course of performing their duties, the detail men of Eli Lilly and Company will, on occasion, with the permission of the retailer, examine the stocks and inventory of the retailer to ascertain whether the retailer may be carrying a sufficient supply to meet potential demand. After such examination, the detail man may thereafter make certain recommendations to the retailer relating to the enlargement of his available supply. Detail men also make available to the retail druggists advertising and promotional material free of any charge to the retail druggist.

Leonard L. Audino

Subscribed and sworn to before me
this 20th day of August, 1959.

Eleanor C. Hanlon,
A Notary Public of N. J.
My Comm. Expires 12/11/63.

[fol. 35]

IN THE SUPERIOR COURT OF NEW JERSEY
UNION COUNTY

OPINION—Filed September 29, 1959

Decided September 29, 1959.

Messrs. Lorentz and Stamler (Messrs. Joseph H. Stamler and Melvin P. Antell appearing), Attorneys for Plaintiff.

Messrs. Lum, Fairlie & Foster (Messrs. William F. Tompkins and Warren E. Dunn appearing), Attorneys for Defendant.

Scherer, J. S. C.

Plaintiff is a corporation of the State of Indiana not authorized to transact business in the State of New Jersey. It does not have a certificate from the Secretary of State as required by N. J. S. 14:15-4. It filed the present suit to compel the defendant to comply with minimum prices fixed for the resale of plaintiff's products, in accordance with N. J. S. 56:4-3 et seq., generally known as the Fair Trade Act. The facts are substantially undisputed and appear in the affidavits filed by both parties.

Plaintiff is one of the largest dealers of pharmaceutical products in this country, if not in the world, and its products are distributed throughout the United States and in foreign countries. Its office and principal place of business is in Indianapolis, Indiana. Plaintiff's products within the United States are sold to selected wholesale distributors and in interstate commerce. It is said that the business done in New Jersey represents 2.7% of its domestic sales. Plaintiff does not sell directly to the retail trade, but its products reach the retail trade through wholesale distributors. Plaintiff says that it leases no sales office, owns no real estate, and maintains no warehouse or other place of business in this state. Its products are "fair traded" in New Jersey [fol. 36] under the above cited statute and it claims to have approximately 1500 contracts in effect in this state signed

by retailers of its products, under which these retailers agree to maintain the minimum price structure fixed by plaintiff.

Defendant is a retail drug company with stores in Plainfield and Carteret. Defendant did not sign any contract, but it admits having notice of the fact that plaintiff has fair trade contracts in force and that it is, therefore, bound by the provisions of the Fair Trade Act, unless its other defenses are sustained. Even though a non-signer, defendant must maintain plaintiff's minimum price structure. N. J. S. 56:4-6; *Lionel Corp. v. Grayson-Robinson Stores*, 15 N. J. 191 (1954), appeal denied 99 L. ed. 677, 348 U. S. 859 (1954).

The complaint charges that defendant sold plaintiff's products below the minimum prices fixed by it, in that in some instances, while selling at the minimum prices, it gave to its customers "S. & H. Green Cooperative Cash Discount Stamps," which are redeemable for merchandise, thus in effect lowering the prices of plaintiff's products below the minimum by the amount of the discount represented by the stamps. Whether this constitutes willfully and knowingly advertising or selling plaintiff's products at less than the prices stipulated by it—which defendant denies—need not be now decided. See *E. R. Squibb & Sons and Eli Lilly Company v. Charline's Cut Rate, Inc.*, 9 N. J. Super. 328 (Ch. Div. 1950); *Bristol-Myers Co. v. Picker*, 96 N. E. 2d 177 (Ct. App., N. Y. 1950); *Bristol-Myers Co. v. Lit Brothers, Inc.*, 6 A. 2d 843 (Sup. Ct., Pa. 1939); *Weeco Products Co. v. Mid-City Cut Rate Drug Stores*, 131 P. 2d 856 (Dist. Ct. App., Cal. 1942); *Sperry and Hutchinson Co. v. Margetts*, 15 N. J. 203 (1954). Defendant is charged also with violating the minimum price structure by selling other products of the plaintiff below the minimum prices in cases where no stamps were given. Plaintiff originally applied [fol. 37] for an interlocutory injunction (R. R. 4:67) to enjoin all sales by defendant below minimum prices until final hearing.

Defendant admitted the sales but denied that in any instance the sales were below minimum prices or that there were any willful and knowing sales below such prices, in violation of N. J. S. 56:4-6. With respect to the sales made

of products other than those with which stamps were given, defendant states that it made up packages from bulk shipments and that the products of plaintiff were packaged under defendant's name and, therefore, they were exempt under the provisions of N. J. S. 56:4-5(1). It is doubtful that this constitutes a good defense because the bottle which was marked in evidence clearly disclosed that the plaintiff's name and trademark appeared on the label, and defendant was obviously seeking to gain the benefit of plaintiff's good will. This may not be done. *Johnson & Johnson v. Weissburd*, 121 N. J. Eq. 585, 586 (E. & A. 1937).

The substantial defense interposed is that plaintiff, being a foreign corporation, was required as a condition precedent to transacting business in this state to file with the Secretary of State, under N. J. S. 14:15-3, a copy of its certificate of incorporation and a statement providing information required by that section, and, as a preliminary to instituting suit in this state "upon any contract made by it in this state," was required to obtain a certificate from the Secretary of State under N. J. S. 14:15-4. It is conceded that neither of the last cited sections has been complied with by the plaintiff.

Plaintiff's application for an interlocutory injunction was denied on the ground that its right to relief was not clear as a matter of law, in view of the above mentioned legal defenses. *General Electric Co. v. Gem Vacuum Stores*, 36 N. J. Super. 234 (App. Div. 1955); *Wilentz v. Crown Laundry Service, Inc.*, 116 N. J. Eq. 40 (Ch. 1934); *Allman* [fol. 38] v. *United Brotherhood of Carpenters, &c.*, 79 N. J. Eq. 150, 155 (Ch. 1911).

The matter is now before the Court on defendant's motion to strike the complaint and for summary judgment on the ground that the plaintiff is transacting business in this state contrary to N. J. S. 14:15-3 and, being a foreign corporation, is precluded from bringing this action under N. J. S. 14:15-4. As an integral part of these defenses, the defendant urges the provision of N. J. S. 14:15-5, where it is provided as follows:

“14:15-5. Obligations imposed on domestic corporations doing business in foreign states imposed on foreign corporations

When, by the laws of any other state or nation, any other or greater taxes, fines, penalties, licenses, fees or other obligations or requirements are imposed upon corporations of this state, doing business in such other state or nation, or upon their agents therein, than the laws of this state impose upon their corporations or agents doing business in this state, so long as such laws continue in force in such foreign state or nation, the same taxes, fines, penalties, licenses, fees, obligations and requirements of whatever kind shall be imposed upon all corporations of such other state or nation doing business within this state and upon their agents here, but nothing herein shall be held to repeal any duty, condition or requirement now imposed by law upon such corporations of other states or nations transacting business in this state.”

The State of Indiana has a similar statute, and the requirements of that state upon foreign corporations are much more onerous than those imposed by our statute. The [fol. 39] Indiana statute (Burns Annotated Statutes of Indiana) provides:

“25-314: Penalties. No foreign corporation transacting business in this state without procuring a certificate of admission or, if such a certificate has been procured, after its certificate of admission has been withdrawn or revoked, *shall maintain any suit or proceeding in any of the courts of this state upon any demand, whether arising out of contract or tort*; and every such corporation so transacting business shall be liable by reason thereof to a penalty of not exceeding ten thousand dollars (\$10,000), to be recovered in any court of competent jurisdiction in an action to be begun and prosecuted by the attorney general in any county in which such business was transacted.

“If any foreign corporation shall transact business in this state without procuring a certificate of admis-

sion, or, if a certificate has been withdrawn or revoked, or shall transact any business not authorized by such certificate, such corporation shall not be entitled to maintain any suit or action at law or in equity upon any claim, legal or equitable whether arising out of contract or tort, in any court in this state; and it shall be the duty of the attorney general, upon being advised that any foreign corporation is so transacting business in this state, to bring action in the circuit or superior court of Marion County for an injunction to restrain it from transacting such unauthorized business and for the annulment of its certificate of admission, if one has been procured. * * * ." (Emphasis supplied.)

Plaintiff argues that it is not doing business in this state and that, even if it be held that it is, the above cited pro-[fol. 40] visions of our Corporation Act do not apply to it because its goods are distributed solely in interstate commerce, thus-exempting it from the provisions of any regulatory state statute of the kind above quoted, and that to apply to it the provisions of N. J. S. 14:15-3, 4 and 5 is to impose a burden upon interstate commerce which is forbidden by the commerce clause of the Federal Constitution (*United States Constitution*, Article I, Sec. 8, Clause 3).

Plaintiff countered the motion to dismiss with a renewal of its motion for interlocutory injunction on the ground that, if the defendant's motion should be denied, then plaintiff's motion should be granted because then its right to relief as a matter of law would be clear, thus eliminating the reason for the original denial of its motion.

I.

Is the plaintiff doing business in New Jersey? The facts in the affidavits filed in support of the respective motions differ in only one material respect. Defendant says that plaintiff's salesmen, or "detailmen" as plaintiff calls them, in New Jersey accept orders for the purchase of plaintiff's products, while plaintiff denies this to be true and says that, even though on occasions its representatives may receive an order for plaintiff's products, they do so only for the

purpose of transmitting the same to the wholesaler and that such orders are subject to acceptance or rejection by such wholesaler. In view of the result reached, this fact is immaterial, but it will be assumed that the plaintiff's statement is correct.

The facts are these: Plaintiff maintains an office at 60 Park Place, Newark, New Jersey. Its name is on the door and on the tenant registry in the lobby of the building. (The September 1959 issue of the Newark Telephone Directory lists the plaintiff both in the regular section and in the classified section under "Pharmaceutical Products" as having [fol. 41] ing an office at 60 Park Place, Newark.) The lessor of the space is plaintiff's employee, Leonard L. Audino, who is district manager in charge of its marketing division for the district known as Newark. Plaintiff is not a party to the lease, but it reimburses Audino "for all expenses incidental to the maintenance and operation of said office." There is a secretary in the office, who is paid directly by the plaintiff on a salary basis. There are eighteen "detailmen" under the supervision of Audino. These detailmen are paid on a salary basis by the plaintiff, but receive no commission. Many, if not all of them, reside in the State of New Jersey. Whether plaintiff pays unemployment, or other taxes to the State of New Jersey is not stated. It is the function of the detailmen to visit retail pharmacists, physicians and hospitals in order to acquaint them with the products of the plaintiff with a view to encouraging the use of these products. Plaintiff contends that their work is "promotional and informational only." On an occasion, these detailmen, "as a service to the retailer," may receive an order for plaintiff's products for transmittal to a wholesaler. They examine the stocks and inventory of retailers and make recommendations to them relating to the supplying and merchandising of plaintiff's products. They also make available to retail druggists, free of charge, advertising and promotional material. When defendant opened its store in Carteret, plaintiff offered to provide, and did provide, announcements for mailing to the medical profession, without cost to defendant. The same thing occurred when defendant opened its Plainfield stores. Plaintiff says that all of its fair trade contracts and orders for its products are

subject to acceptance in Indiana, and therefore none of them constitutes a contract made, or order taken, in this state.

Despite the above recited facts, plaintiff insists that it is not doing business in New Jersey. It concedes that, per-[fol. 42] haps for the purpose of having service of process made upon it in a suit in which it is a defendant, it might conceivably be properly served within this state. But, it says that, although it may be subject to the jurisdiction of the state courts and amenable to service of process therein when it is sued, it is not subject to the statute regulating foreign corporations or prescribing the conditions of their doing business in that state. 146 A. L. R. 942. The difference, it is claimed, is ascribable to the fact that the power of a state to subject a foreign corporation engaged in interstate commerce to local regulations is limited and restricted by the commerce clause of the Federal Constitution. On this subject, more hereafter.

The New Jersey Corporation Act does not define "transacting any business" in this state. Our Supreme Court, in *A & M Trading Corp. v. Pennsylvania R. Co.*, 13 N. J. 516 (1953), quoting with approval from *Yedwab v. M. A. Richards Corp.*, 137 N. J. L. 448 (Sup. Ct. 1948), observed that doing business is a term that is not susceptible of precise definition automatically resolving every case, and that each case turns upon its own circumstances.

To hold under the facts above recited that plaintiff is not doing business in New Jersey is to completely ignore reality. A corporation thus acting within this state should not be permitted to take advantage of the laws of this state which promote its business, such as the Fair Trade Act (which is the sole basis for this suit), and yet not comply with reasonable regulatory provisions of our Corporation Act. As is noted in 146 A. L. R. 957, where this subject is discussed in detail, many corporations selling products in the several states act, with a studied purpose, to avoid the necessity of conforming to state laws or becoming subject to service of process. *Thew Shovel Co. v. Superior Ct.*, 95 P. 2d 149 (App. Ct., Cal. 1939).

[fol. 43] Most of the cases in which the question of whether a corporation is or is not doing business in a particular state has arisen are those in which service of process was at-

tempted to be made upon a foreign corporation or a tax was sought to be assessed. See *Miklos v. Liberty Coach Co.*, 48 N. J. Super. 591 (App. Div. 1958); *International Shoe Co. v. Washington*, 326 U. S. 310, 90 L. ed. 95 (1945); *McGee v. International Life Ins. Co.*, 355 U. S. 220, 2 L. ed. 2d 223 (1957); *A & M Trading Corp. v. Pennsylvania R. Co.*, *supra*; *Westerdale v. Kaiser-Frazer Corp.*, 6 N. J. 571 (1951). The present case is the converse of those cited. Here, the plaintiff seeks not to avoid service, but to be permitted to sue:

If, as stated in the *Miklos* case (quoting from the *International Shoe Co.* case), at p. 598, "that in order to subject a foreign corporation to a judgment *in personam*, if it be not present within the territory of the forum, it have 'certain minimum contacts with (the forum) such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice",'" so the plaintiff here, in the interest of fair play and substantial justice, should not object to complying with the requirements of the Corporation Act and securing a certificate to do business here, thus enabling it to maintain its suit. This, however, the plaintiff refuses to do. It has been held that such a certificate is secured timely if taken out pending an action. *Lehigh, &c., Co. v. Atlantic S. & R. Works*, 92 N. J. Eq. 131, 148 (Ch. 1920). It has been stated that the effect of the *International Shoe Co.* case was to establish a rule that, where a foreign corporation is present within the state, the court looks not only to the regularity, continuity and extent of the corporate activity within the state, but also to whether the cause of action asserted resulted from the corporate activity within the state and the convenience to the parties. *Fletcher, Corporations*, Sec. 8713.1, pp. 419-420. [fol. 44] Plaintiff cites *Remington Arms Co. v. Lechmere Tire & Sales Co.*, 158 N. E. 2d 134 (Sup. Jud. Ct., Mass. 1959), as an example of a case where a foreign corporation, under facts quite similar to those here, was held not to be doing business in Massachusetts and was not required to secure a certificate to do business as a condition precedent to securing relief under the local Fair Trade Act. The suit was started under the Massachusetts Fair Trade Act, and the defenses here interposed were there set up, but over-

ruled. Plaintiff was granted an injunction. The Massachusetts court held that Remington was not doing business within that state and had a right to use the facilities of the Massachusetts courts. Significantly, however, the court said, at p. 138, that its findings were based upon earlier decisions and that it had not been asked to reconsider those in the light of subsequent United States Supreme Court decisions broadening the scope of local regulations dealing with foreign corporations. It would appear, therefore, that, if this precise point had been argued, the result might have been different.

Applying the tests set forth in the cited authorities to the undisputed evidence disclosed by the affidavits, the conclusion is inescapable that the plaintiff was in fact doing business in this state at the time of the acts complained of and was required to, but did not, comply with the provisions of the Corporation Act.

II.

Plaintiff contends that it is excepted from any requirement to comply with foreign corporation provisions of our Corporation Act because it is engaged entirely in interstate commerce, and that it is unlawful for any state to impose such regulations upon interstate commerce as will constitute a burden thereon.

[fol. 45] Not all state regulations affecting foreign corporations constitute a burden upon interstate commerce, thereby rendering them unconstitutional. *General Electric Co. v. Packard Bamberger & Co.*, 14 N. J. 209, 221 (1953). The regulation is only unlawful if it materially restricts the free flow of commerce across state lines. In *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 89 L. ed. 1915, 1925 (1945), the court said:

" * * * There has thus been left to the states wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern."

Plaintiff relies heavily for support of its argument on *International Text Book Co. v. Pigg*, 217 U. S. 91, 54 L. ed. 678 (1910). There, the court struck down a Kansas statute requiring a foreign corporation to secure a certificate to do business as a condition precedent to instituting suit. A comparison of the Kansas statute with ours will show that the requirements of that statute were much more onerous than those in our statute. It is interesting to note, also, that the court did not specifically pass upon the requirement that the corporation have a certificate before instituting suit, but held that, since this section of the statute was so connected with the other sections held unconstitutional as to be inseparable, it, too, had to fall. The court went on to say, at page 687:

" * * * How far a corporation of one state is entitled to claim in another state, where it is doing business, equality of treatment with individual citizens in respect [fol. 46] of the right to sue and defend in the courts, is a question which the exigencies of this case do not require to be definitely decided. * * * "

This case was followed by our former Supreme Court in *Federal Schools, Inc. v. Sidden*, 14 N. J. Misc. 892 (1936), but the decision in that case rested not upon any alleged illegal interference with interstate commerce, but upon the fact that the contract sued upon, being one made outside of New Jersey, was not interdicted by the provisions of then Section 98 of the Corporation Act (now N. J. S. 14:15-4).

The trend and philosophy of the more recent cases has been in favor of upholding, rather than striking down, reasonable state regulations of foreign corporations. This is illustrated by the very recent case of *Portland Cement Co. v. Minnesota*, 3 L. ed. 2d 421, 79 S. Ct. (1959), in upholding a state income tax imposed upon a foreign corporation. In sustaining the right of a state to exact an income tax from a foreign corporation upon that portion of its profits derived from activities within the state, the court said, at page 429:

" * * * While it is true that a State may not erect a wall around its borders preventing commerce an

entry, it is axiomatic that the founders did not intend to immunize such commerce from carrying its fair share of the costs of the state government in return for the benefits it derives from within the State. * * *."

As early as 1908, the Supreme Court, in *Galveston, H. & S. A. R. Co. v. Texas*, 52 L. ed. 1031, 210 U. S. 217 (1908), said:

[fol. 47] "It being once admitted, as of course it must be, that not every law that affects commerce among the states is a regulation of it in a constitutional sense, nice distinctions are to be expected. Regulation and commerce among the states both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines. * * *."

If the levying of an income tax on the business of a foreign corporation which is generated within a state is not a burden upon interstate commerce, how can it be said that a simple regulatory statute, such as the cited sections of our Corporation Act, can impose a burden upon interstate commerce?

It must also be borne in mind that the cause of action here sued upon arises only because of the provisions of our Fair Trade Act. Such contract as the plaintiff relies upon would be illegal except for the provisions of that statute. *General Electric Co. v. Packard Bamberger & Co.*, *supra*. Can it be said that there is anything unfair about requiring a foreign corporation, which seeks to take advantage of a cause of action given it by one of our laws, to comply with the provisions of the other as a condition to taking advantage of the other statute? To pose the question is to suggest the answer.

In the *General Electric Co.* case, the court said that, although the power of Congress over interstate commerce may be exclusive as to a direct statutory regulation of interstate commerce as such, the states are authorized under pertinent decisions of the United States Supreme Court (citing cases) to enact regulations which affect all business done in the state, if such regulations are reasonable and not burdensome to interstate commerce. The simple require-

ments of our Corporation Act are reasonable and cannot be [fol. 48] called burdensome. To hold that these regulations constitute such a burden upon interstate commerce as to exempt the plaintiff from the provisions thereof is to indulge in an unwarranted legalism.

The cases of *Seagram Distillers Company v. Corensuet*, 281 S. W. 2d 657 (Sup. Ct., Tenn. 1955); *State v. Ford Motor Co.*, 38 S. E. 2d 242 (Sup. Ct., S. C. 1946); *Bulova Watch Co. v. Anderson*, 70 N. W. 2d 243 (Sup. Ct., Wis. 1955), cited by plaintiff in support of its position, have been examined, and the holdings there do not require any change in the result here reached.

III.

Finally, it is argued that the provisions of N. J. S. 14:15-4 do not apply because that section precludes the maintaining of an action in this state only "upon any contract made by it (the foreign corporation) in this state." Admittedly, the 1500 contracts made by plaintiff with its retailers are Indiana contracts, since they were subject to acceptance there, and it is said that the orders received for plaintiff's products are likewise subject to acceptance in Indiana.

That this statute is ordinarily limited to contracts made in this state has been held in several cases. *Federal Schools, Inc. v. Sidden*, *supra* (and the numerous cases therein cited); *Protective Finance Corp. v. Glass*, 100 N. J. L. 85 (Sup. Ct. 1924); *Lehigh, &c., Co. v. Atlantic S. & R. Works*, *supra*. None of these cases was a suit upon a cause of action arising only out of one of our statutes. Also, this argument does not take into consideration the provisions of N. J. S. 14:15-5 (sometimes referred to as a "mutual spite" or "retaliatory" statute). Most states, including, as above noted, Indiana, have such statutes.

[fol. 49] The Indiana statute bars suits arising out of contract, as well as tort, whether such actions are at law or in equity. Plaintiff argues that its action is one in tort and therefore not precluded by the Corporation Act. It would seem, however, that the action is one on contract because, while the defendant is a non-signer of a fair trade contract, it is liable under the statute since other persons have

signed such contracts. Non-signers have been held to be bound to the same degree as signers. See *Old Dearborn D. Co. v. Seagram-Distil. Corp.*, 299 U. S. 183, 81 L. ed. 109 (1936); *Lionel Corp. v. Grayson-Robinson Stores*, *supra*.

Quære: Under these circumstances, is not the relationship of the plaintiff and defendant one of a contract made in the State of New Jersey, created by the Fair Trade Act as a result of the signing of other contracts by persons in New Jersey?

N. J. S. 14:15-5 was discussed in *Ex-Cell-o Corp. v. Farmers Coop. Dairies Ass'n.*, 28 N. J. Super. 159 (App. Div. 1953), but its provisions were not applied because the defense was first raised on appeal, and not below. That opinion indicates—without stating reasons—that this may be a disfavored defense. But, when timely raised, as here, it should not be so considered. No valid reason is given by plaintiff why the provisions of the statute should not be applied, except the argument concerning interstate commerce heretofore disposed of. In *Babe Kaufman Music Corp. v. Mandia*, 127 N. J. Eq. 480 (Ch. 1940), this defense was interposed and the court, after reviewing the retaliatory provisions of the New York Corporation Law—the plaintiff being a corporation of New York—refused to enforce the contract.

While it is clear that the provisions of N. J. S. 14:15-4 apply, and that the relationship between plaintiff and defendant is based upon a contract made in this state by [fol. 50] virtue of the Fair Trade Act, it is also clear that the provisions of N. J. S. 14:15-5 are applicable and, based upon the retaliatory provisions of the Indiana statute, the plaintiff's suit is barred. The plaintiff's application for an interlocutory injunction, therefore, is denied.

Since the affidavits disclose palpably that there is no genuine issue as to any material fact, the defendant is entitled to a summary judgment dismissing the complaint, with costs. R. R. 4:58-3; *Frank Rizzo, Inc. v. Alatsas*, 27 N. J. 400, 405 (1958).

A judgment may be presented in accordance with these conclusions.

[fol. 51]

IN THE SUPERIOR COURT OF NEW JERSEY
UNION COUNTY

FINAL JUDGMENT DISMISSING COMPLAINT—Filed
October 1, 1959 at 1:55 p. m.

This matter having been opened to the Court on Friday, August 21, 1959 by Lum, Fairlie & Foster, Attorneys for Defendant (William F. Tompkins and Warren E. Dunn appearing) in the presence of Lorentz & Stamler, Attorneys for Plaintiff (Melvin P. Antell appearing) and in the presence of Casey, Lane & Mittendorf of the New York Bar, of Counsel to the Defendant (Roger Lloyd and Klaus Motulsky appearing), upon Defendant's motion to dismiss the complaint, and the Court having considered all of the pleadings, affidavits, exhibits and proofs, and the Court having further considered the argument of counsel thereon, and the Court having rendered a written opinion on September 29th, 1959, for the reasons therein stated,

It is on this 1st day of October, 1959,

Ordered and adjudged that the Complaint be and the same hereby is dismissed, with costs to the defendant.

Everett M. Scherer, J. S. C.

We hereby consent to the form of the foregoing order.

Lorentz & Stamler, Attorneys for Plaintiff, By
Melvin P. Antell, A. Partner.

[fol. 52]

IN THE SUPERIOR COURT OF NEW JERSEY
UNION COUNTY

NOTICE OF APPEAL—Filed October 1, 1959 at 2 p. m.

To: Lum, Fairlie & Foster,
Attorneys for Defendant,
605 Broad Street,
Newark 2, New Jersey.

Hon. Everett M. Scherer, J. S. C.,
Hall of Records, High Street,
Newark, New Jersey.

Sirs:

Please take notice that plaintiff, Eli Lilly and Company hereby appeals to the Appellate Division of the Superior Court from the Final Judgment of the Chancery Division entered in the above entitled matter dismissing the Complaint filed herein on October 1, 1959.

Lorentz & Stamler, Attorneys for Plaintiff, By
Melvin P. Antell, A Member of the Firm.

Dated: October 1, 1959.

[fol. 53]

SUPREME COURT OF NEW JERSEY

No. 3139—September Term

Civil Action

On Certification

ELI LILLY AND COMPANY, a corporation of the
State of Indiana, Plaintiff-Appellant,

vs.

SAV-ON-DRUGS, INC., a corporation of the State of
New Jersey, Defendant-Respondent.

ORDER ON CERTIFICATION—December 21, 1959

Pursuant to Rule 1:10-1 it is Ordered that the appeal from the judgment entered in this cause on October 1, 1959, in the Superior Court, Chancery Division, now pending in the Superior Court, Appellate Division (A-70-59), be certified directly to this Court, to the end that it may be reviewed by this Court; and it is further

Ordered that this cause shall be deemed pending on appeal in this Court, and that further proceedings herein shall be had in the same manner as provided for on appeals as of right, in accordance with the rules of this Court; and it is further

Ordered that all papers necessary to be filed in the cause by the parties hereto in the prosecution of this appeal, down to and including the entry of mandate, shall be filed by the Clerk of this Court without the payment to him of fees for such filing.

Dated December 21, 1959.

By the Court

Joseph Weintraub, Chief Justice.

SUPREME COURT OF NEW JERSEY
CHECK LIST

No. A-85—September Term, 1959

On appeal from Chancery Division, Superior Court

ELI LILLY AND COMPANY, Plaintiff-Appellant,
and

SAV-ON-DRUGS, INC., Defendant-Respondent.

Decided March 7, 1960.

The Chief Justice presiding.

Opinion by Below.

	Affirm	Reverse
The Chief Justice	1	
Mr. Justice Burling	1	
“ “ Jacobs	1	
“ “ Francis	1	
“ “ Proctor	1	
“ “ Hall		1
“ “ Schettino	1	
	<hr/>	<hr/>
Totals	6	1

[fol. 55]

SUPREME COURT OF NEW JERSEY

No. A85—September Term 1959

ELI LILLY AND COMPANY, a corporation of the
State of Indiana, Plaintiff-Appellant,

vs.

SAV-ON-DRUGS, INC., a corporation of the State of
New Jersey, Defendant-Respondent.

Argued February 22, 1960

On appeal from a judgment of the Superior Court, Chancery Division, whose opinion is reported at 57 N. J. Super. 291.

Mr. Melvin P. Antell argued the cause for the appellant (Messrs. Lorentz & Stamler, attorneys).

Mr. Warren E. Dunn argued the cause for the defendant-respondent (Messrs. Lum, Fairlie & Foster, attorneys; Mr. Claus Motulsky, of the New York bar, on the brief).

Mr. Murry Brochin argued the cause for the State of New Jersey, intervenor (Mr. David D. Furman, attorney).

OPINION—March 7, 1960

Per Curiam

The judgment is affirmed for the reasons expressed in the opinion of Judge Scherer in the Court below.

[fol. 56]

SUPREME COURT OF NEW JERSEY

Appeal Docket No. 3139

Civil Action

On Appeal

ELI LILLY AND COMPANY, a corporation of the
State of Indiana, Plaintiff-Appellant,

vs.

SAV-ON-DRUGS, INC., a corporation of the State of
New Jersey, Defendant-Respondent.

MANDATE ON AFFIRMANCE—March 7, 1960

This cause having been duly argued before this Court by Mr. Melvin P. Antell, counsel for the appellant and Mr. Warren E. Dunn, counsel for the respondent, and Mr. Murry Brochin, counsel for the State of New Jersey, intervenor, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Chancery Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court—Chancery Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

Witness the Honorable Joseph Weintraub, Chief Justice,
at Trenton on the seventh day of March, 1960.

John H. Gildea, Clerk of the Supreme Court.

[fol. 57]

SUPREME COURT OF NEW JERSEY

No. A85—September Term, 1959

Civil Action

ELI LILLY AND COMPANY, a corporation of the
State of Indiana, Plaintiff-Appellant,

—vs.—

SAV-ON-DRUGS, INC., a corporation of the State of
New Jersey, Defendant-Respondent.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—Dated April 22, 1960

I. Notice is hereby given that Eli Lilly and Company, the appellant above-named, appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of New Jersey affirming the dismissal of the complaint filed by plaintiff, which said final judgment was entered in this action on March 7, 1960.

This appeal is taken pursuant to 28 U. S. C. Section 1257 (2).

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include therein the following:

	<i>Page of Appendix</i>
Complaint	1a
Exhibit A—Contract	15a
Exhibit E—Letter of November 5, 1958 ..	16a
Exhibit F—Letter of March 30, 1959	17a
Affidavit of Louis V. Clemente	19a
Notice of Motion for Interlocutory Injunction	20a
Affidavit of Richard L. Bonello	21a
Affidavit of Warren E. Dunn	22a
Order Denying Interlocutory Injunction	24a

Notice of Motion	26a
Affidavit of Samuel J. Sirota	27a
Affidavit of James P. Herring	28a
Affidavit of R. O. Clutter	31a
Affidavit of Leonard L. Audino	33a
Opinion of Superior Court, Chancery Division	35a
Final Judgment Dismissing Complaint	51a
Notice of Appeal	52a
Opinion of Supreme Court of New Jersey on Affirmance	
Mandate on Affirmance	

[fol. 58] III. The following question is presented by this appeal:

Is a state statute repugnant to the Commerce Clause (Article 1, Section 8) of the United States Constitution when applied to deny to a foreign corporation the right to engage in interstate commerce in the state, and to deny it access to the courts of the state, unless and until it obtains from the state a certificate of authority and subjects itself to all the requirements and obligations incident to domestication?

Lorentz and Stamler, Attorneys for Eli Lilly and Company, Appellant, 11 Commerce Street, Newark 2, N. J., By Joseph H. Stamler, A Member of the Firm.

Of Counsel: Everett I. Willis, Esq., Dewey, Ballantine, Bushby, Palmer & Wood, Esqs., 40 Wall Street, New York City, New York.

Dated: April 22, 1960.

[fol. 59]

SUPREME COURT OF NEW JERSEY

No. A85—September Term, 1959

[Title omitted]

CROSS-DESIGNATION OF RECORD ON APPEAL—Filed
May 16, 1960

The Clerk will please include, when preparing a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, the following which is hereby designated by the Defendant-Respondent as an additional portion of the record that Defendant-Respondent desires be included on the record herein to be certified to the United States Supreme Court:

Exhibit D-1 introduced in evidence on August 11, 1959 (Certificate of New Jersey Secretary of State that on August 10, 1959 Eli Lilly and Company was not authorized to transact business in New Jersey as a foreign corporation).

Lum, Fairlie & Foster, By Joseph J. Biunno, a Partner, Attorneys for Defendant-Respondent, 605 Broad Street, Newark 2, New Jersey.

Of Counsel: Casey, Lane & Mittendorf, 26 Broadway, New York 4, New York.

[fol. 60]

EXHIBIT "D-1"

STATE OF NEW JERSEY

[Emblem]

DEPARTMENT OF STATE

I, EDWARD J. PATTEN, Secretary of State of the State of New Jersey, DO HEREBY CERTIFY that so far as the records show this office has no record of a corporation entitled ELI-LILLY AND COMPANY nor is it a foreign corporation authorized to transact business in this State.

[Seal]

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Official Seal at Trenton, this Tenth day of August A.D. 1959:

EDWARD J. PATTEN,
Secretary of State.

[fol. 61] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 62] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 63]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—October 17, 1960

Appeal From the Supreme Court of the State of New Jersey.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

October 17, 1960